IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 670 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HATHISING R RAJ

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for Petitioner

MR SP DAVE, LD APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 15/04/98

ORAL JUDGEMENT

1. This appeal has been directed against the impugned judgment and order dated 14/9/1989 rendered by the Ld. Addl. Sessions Judge, Bharuch in Sessions Case No. 81/1987. The appellant - Hathising Raising Raj, the accused in the aforesaid Sessions Case, came to be prosecuted for the offences punishable u/Ss. 307 and 353 of the Indian Penal Code (for short 'IPC') on the

following brief facts of the prosecution case :-

2. The accused who happened to be in police service and at the relevant point of time serving as an Unarmed Head Constable in the Hansot Police Station, was frequently remaining on leave including sick leave. The complainant Guman Parbhubhai, an Armed Police Constable in the same police station had asked him why he was frequently going on sick leave, on or around 9/10/1986. The accused retorted that the complainant should not bother about the same. On the next day i.e. on 10/10/1986 the complainant was on his duty at about 1.00 O'clock in the afternoon as the Guard at the Treasury Office situated nearby the Hansot Police Station. The accused approached the complainant at that point of time, snatched away his gun and had also taken out one of the cartridges from the pouch of the complainant and loaded the same in the gun. He had then pointed the gun at the complainant. The complainant therefore, shouted (for help). As a result of the complainant's shouts other police persons on duty rushed there and caught hold of the accused. This resulted in the gun getting triggered off at the ceiling of the Osari portion of the Treasury Office. The accused was, therefore, charged with the offences as aforesaid on the gound that if a shot was fired at the complainant, the complainant would have been injured or would have lost his life.

3. After evidence was adduced by the prosecution and after statement of the accused was recorded u/S. 313 of the Code of Criminal Procedure, 1973 (II of 1974) and after the arguments were heard, the learned Addl. Sessions Judge convicted the accused of the offence as aforesaid and sentenced him to undergo rigorous imprisonment (RI) for a period of 3 years and to pay fine of Rs.300/-, in default to undergo RI for 15 days for the offence punishable u/S. 307 of the IPC. No separate sentence was imposed for the offence punishable u/S. 353 of the IPC. The accused has been aggrieved with the said order of conviction and sentence and that is how he has been before this Court as stated above.

4. It was the defence of the accused that on 9/10/1986 he had obtained sick report from the Government Hospital at Jaghadia and he had gone at the Hansot Police Station on 10/10/1986 (for reporting himself to be on duty). At that time Police Station Officer, Head Constable Roopsing Maganbhai was present at the Hansot Police Station. The Police Sub-Inspector had gone for Bandobast and, therefore, he was not present. He asked Roopsing to accept the sick report and to permit him to

have reporting as on duty in the police station. Roopsing Maganbhai informed him that they should wait for Pannalal. By the time Pannalal was seen proceeding towards the police station, the accused was in the company of the complainant Gumanbhai and there were two persons Chandulal Nanalal Gohil and Bharatbhai Vanand, who had come in the Treasury Office sitting near the entrance. The accused informed complainant Guman Parbhu that he had asked Natvar Mohanbhai for bringing his lunch, but Natvar Mohanbhai had not returned. Thereupon the complainant suggested that since the police line was in the vicinity he would go and bring the lunch for the accused. The complainant Guman Parbhu thereupon left his pouch, belt and rifle (gun) at the place nearby the aforesaid two persons. In the meantime Pannalal reached there, with the result that the accused requested for entrusting him the charge. By the time the accused and Pannalal were talking about the same, complainant Guman Parbhu also reached the entrance of the Treasury office with the tiffin. At that very point of time there was a fire. The accused and Roopsing therefore, went out and found that the rifle was in the hands of complainant Guman Parbhu. Upon being asked what he did (with the rifle) the complainant informed that the aforesaid two outsiders from Garudev and known to Hathising and complainant had loaded the gun with the cartridge and as he had forgotten to lock the safety mechanism and as the complainant had struck the trigger, there was a firing. There was a talk with regard to solving the problem which had arisen on account of firing of the shot from the gun held by the complainant. Since the accused was not on duty it was suggested that he should go for making arrangement of a replacement cartridge. The accused, therefore, went for making arrangement of replacement cartridge at Bharuch, but he could not get one. He, therefore, returned at Hansot at about 5- 5.30 O'clock in the afternoon. He came to know at the S.T. Bus Stand itself that there was an offence of firing registered against him. Consequently the accused had run away for the purpose of making arrangement for a surety. It is thus the defence of the accused that a false case was launched against him.

5. In support of the prosecution case as aforesaid, following witnesses were examined :-

i. Complainant Guman Parbhu exh. 8
ii. Head Constable Kuvarsinh Bhagatsinh, exh. 9
iii. Panch witness Natvarbhai Narottambhai, exh. 14
iv. Another panch witness Ratilal Ramsing, exh.16
v. Police Station Officer Pannalal Lalubhai, exh. 19

vi. Ahmed Rasul Sindha, Circle Officer, Mamlatdar office, Hansot, exh. 22
vii Sub-Treasury officer, Chimanbhai Lallubhai Barot, exh.24,
viii. Mistry Maganbhai Jerambhai, carpenter exh.25,
ix. Investigating Officer Chaitanyaprasad Gajanand, PSI exh. 26 and
x. Head Constable Maganbhai Parshotambhai, exh.31.

6. The prosecution also placed on record following documents :-

i. Complaint exh. 20
ii. Panchnama with regard to scene of offence exh.16
iii. Seizure memo with regard to the pellets and the plank of the ceiling exh. 17
iv. Register of Treasury Guards, exh.18
v. Forwarding letter exh. 6 whereby the Muddamal articles were sent for examination by FSL.
vi. Report of FSL exh.7
vii. The map of the scene of offence exh. 23
viii. The report with regard to First Information concerning the incident exh. 13 and
ix. Wireless report exh. 28.

7. Upon appreciation of the evidence, the Ld. Addl. Sessions Judge came to the conclusion that the prosecution established beyond reasonable doubt both the charges levelled against the accused and the defence set out by the accused neither appeared from the prosecution evidence nor was established by adducing any evidence.

8. I have heard learned advocate appearing for the appellant-accused and the Ld. A.P.P. for the State. At first it was submitted on behalf of the accused that the prosecution failed to establish the charges against the accused beyond reasonable doubt. For that purpose the evidences of all the aforesaid witnesses were read before this Court. From the reading of the evidence it was submitted that the gun was triggered off accidentally on account of some grabbling which had taken place. It has been submitted that grabbling was with regard to rifle/gun in question and the grabbling lasted for about 15 minutes. This resulted in accidental triggering of the rifle. The height of the roof was 10 ft. and the height of the roof at the slope of the Osari was 7 ft. Therefore, it would not have been possible for a person standing at that place to have raised the gun and fired a shot in air. From the relevant Panchnama it was submitted that this could have happened only from the place where the aforesaid two outsiders were sitting and

the grabbling also must have taken place while the complainant and the aforesaid two persons were sitting near the entrance of the Treasury office. In my opinion, these submissions canvassed on behalf of the appellant cannot be accepted. For that purpose evidence of the complainant might first be noted in brief. The complainant has spoken to the facts of the prosecution case as stated hereinabove. He has deposed that the accused has snatched away his rifle from him and had also taken out cartridge from his pouch and loaded the rifle and pointed the same at him. On the complainant making shouts, the other Guards/Police persons rushed there. As the said Guards/Police persons had overpowered the accused for leaving the rifle, the accused had thrown away the rifle and had run away from the place. Since he had pointed the rifle at him and since the Guards/Police persons had rushed there, he (accused) fired the shot in air landing the cartridge on to the ceiling of the Osari portion of the Treasury and the accused thereafter had run away. The complainant has been cross examined at length. However, the complainant has not been contradicted in the cross-examination with regard to what happened between him and the accused on the day prior to the day of incident as well as on the day of the incident. Even then, what is important to be noticed from the evidence of the complainant is that the accused did not trigger off the rifle at any point of time when he had pointed the same at the complainant. It is also important to notice from the evidence of the complainant that there was a considerable passage of time in the grabbling and pointing of the rifle at the complainant. The time which has been stated by the complainant is of 5 minutes. The time which has been urged on behalf of the appellant is to the extent of 15 minutes in so far as whole of the incident is concerned. One thing is certain that there is a considerable passage of time when the accused is stated to have snatched away the rifle from the complainant and pointed the same at him and upon the shouts made by the complainant, the Guards/Police persons having rushed there. Examining the evidence of the complainant in this light it would clearly appear that there was no intention on the part of the accused to injure the complainant or to take complainant's life. It would also clearly appear that the intention of the accused must be to intimidate the complainant and nothing beyond that. At best the accused must be wanting to teach a lesson to the complainant for not interfering with the problem of accused going on sick leave. There is a positive evidence in the examination in chief of the complainant exh. 8 that when the Guards/Police persons had rushed there the accused had himself fired the shot

in the air. This would belie the prosecution story with regard to the offence punishable u/S. 307 of the I IPC charged against the accused. It is not understandable how the improvised story set out by the complainant in his complaint and set out by the other police witnesses could ever be accepted in the face of the aforesaid positive evidence and the circumstances disclosed from the complainant's examination in chief itself. That apart, so far as the applying of force as a result of the incident which happened between the complainant and the accused on the day prior to the day of incident cannot be doubted. It clearly appears that the accused had an occasion to apply force for the purpose of snatching away the rifle from the person of the complainant, who was on his duty at the relevant point of time. To that extent prosecution evidence is clear and unimpeachable. Complainant has been supported by number of circumstances which flow from the evidence of the other witnesses as well as the other pieces of evidence which have been dealt with and discussed at length by the Ld. Addl. Sessions Judge.

9. However, it has been alternatively submitted on behalf of the accused, as stated above, that the offence u/S. 307 of the IPC has not been established by the prosecution beyond reasonable doubt under the aforesaid circumstances. Over and above the evidence of the complainant as noted above, Mr. Anandjiwala placed reliance upon the FIR as appearing at exh. 13. This clearly indicates about accused himself having fired a shot in air which clearly negatives the prosecution story of firing of the shot in air as a result of the accused having been caught hold of by the Guards/Police persons. Exh. 13 clearly states that when witness Kuvarsinh Bhagatsinh, Police Station officer of Hansot Police Station and other constables had rushed at the scene of offence, they had an occasion to proceed for snatching away rifle from the accused and at that time the accused had himself fired the shot from the gun/rifle in air. This would clearly negative the required intention/knowledge u/S. 307 of the IPC. Even witness Kuvarsinh Bhagatsinh exh.9 has in terms admitted that he had noted the report exh. 13 that would belie the improvised story stated by him in his evidence. It is highly improbable that the accused would have escaped if he was in fact caught hold of by so many police persons, who had rushed there. In fact he must have escaped after firing the shot in air and that is more probable from the facts noted above as also from the evidence which is appearing on the record of the case. It appears that this vital part of the prosecution evidence has escaped

the attention of the Ld. Addl. Sessions Judge. In fact, in support of the facts as noted above, the defence had placed reliance upon a decision of the Apex Court in the case of Hazara Singh v/s. State of Punjab reported in 1971 (1) S.C.C. 529 where it has been observed that the prosecution must prove that when the accused fired his gun it was intended to be fired at some one because it may be that the shots were fired in the air or in some other direction only with a view to create confusion and not to kill. In the words of the Apex Court :-

"6. There can be no manner of doubt that if Hazara Singh and Bhajan Singh fired shots at the police party and even though no one was injured the appellants would be guilty of the offence with which they were charged. The real question is whether it had been proved beyond doubt that the shots were fired at the police party. There could be two possibilities in such a situation; one could be of the shots being fired in the direction of the police party or taking aim at them and the other could be of the shots being fired in the air or in some other direction and not in the direction of the police party merely to create confusion for the purpose of running away. ....."

In my opinion the aforesaid observations are clearly applicable in view of the positive evidence flowing from the mouth of the complainant himself and also flowing from the FIR exh. 13. Hence, the prosecution has failed to prove the offence u/S. 307 of the IPC charged against the accused herein although the prosecution has clearly established beyond any doubt the offence punishable u/S. 353 of the IPC charged against the accused.

The result is that the conviction of the accused u/S. 307 of the IPC shall have to be set aside; whereas his conviction u/S. 353 of the IPC shall have to be confirmed. In so far as conviction is concerned, there shall be order accordingly.

Since no separate sentence was imposed by the Ld. Addl. Sessions Judge in so far as section 353 of the IPC is concerned, it became necessary to hear the learned advocate for the appellant on the question of sentence. Mr. Anandjiwala, learned advocate appearing for the appellant submitted that after passage of such a long time the appellant should be released on a personal bond for his good behaviour. He also relied upon the facts of

the case as noted hereinabove. According to his submission, if the appellant is not released on probation, he would loose his service. He in the alternative submitted that bearing in mind the fact that the appellant might loose his service, he should not be sent to prison and sentence only of fine should be imposed. Mr. S.P. Dave, Ld. A.P.P. for the State submitted that here is a police person, who has been involved in the offence punishable u/S. 353 of the IPC. According to his submission no lenient view should be taken of the matter, since a person who is responsible for the maintenance of discipline as well as law and order has violated the same.

In my opinion, considering the submissions made on behalf of both the sides, this is not a fit case for enlarging the appellant on probation. It is no-doubt true that in Bhagirath v/s. State of M.P. reported in 1982 S.C.C. (Cri.) 131 (II) the Apex Court had an occasion to enlarge the accused in that case on a personal bond. There the accused was alleged to have 'pushed' the Food Inspector and thus was charged for the offence punishable u/S. 353 of the IPC. In the background of such facts the Apex Court observed that the substantive sentence as well as fine imposed by the lower courts on the accused were quite harsh. Besides, the accused was acquitted under the charge of Food Adulteration Act. Under such circumstances, the accused was directed to be released on a bond of good behaviour operative for a period one year. The facts of the present case are quite distinct as aforesaid. It is no-doubt true that nearly 12 years have passed since the commission of the offence. That fact would merit consideration while imposing the sentence. It is also not doubt true that the accused is likely to loose his service. That fact would also merit consideration while imposing the sentence. However, the fact that the accused was belonging to police force cannot be ignored. In that view of the matter, no indulgence as sought for by the learned advocate for the appellant can be shown. Some sentence, in the facts of the present case, is required to be imposed on the accused. Hence, considering the facts and circumstances of the case, following order of sentence is passed upon the appellant-accused herein :-

Appellant-accused - Hathising Raising Raj is directed to undergo sentence till rising of the Court and to pay fine of Rs.300/-. Since the sentence u/S. 307 of the IPC is set aside the fine of Rs.300/- paid by the accused under that sentence shall be treated as fine

under this sentence. Hence, no default sentence is required to be imposed.

This appeal is accordingly partly allowed.

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PVR cr.a67089j.